(2)

No. 06-1543

In The Supreme Court of the United States

Bounpone B. Sasouvong,

Petitioner,

v.

WASHINGTON,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SETH A. FINE, DPA
Counsel of Record

KATHLEEN WEBBER, DPA
SNOHOMISH COUNTY
PROSECUTING ATTORNEY –
CRIMINAL DIVISION
3000 ROCKEFELLER AVENUE
ADMIN EAST, 7TH FLOOR
EVERETT, WASHINGTON 98201
(425) 388-6318
Attorneys for Respondent

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JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) except as argued below.

STATEMENT

Washington State has a determinate sentencing scheme. 9.94A RCW. Pursuant to that scheme an adult offender is presumptively sentenced within a standard sentencing range. The range is determined by a combination of two factors. The first is a legislative determination of the seriousness of the offense for which the offender is being sentenced. The second is the defendant's criminal history which has not been "washed out" due to the time elapsed between conviction and the current offense. Criminal history includes both adult and juvenile convictions. RCW 9.94A.030(12), 9.94A.525.

A jury convicted the defendant of residential burglary on May 20, 2003. After the verdict entered he absconded and was not sentenced until June 7, 2004. At sentencing the State calculated the defendant's offender score at 10, based on six prior adult convictions and five prior juvenile convictions. The defendant acknowledged that his prior juvenile convictions counted toward his offender score calculation. App A. The trial court accepted the parties statement regarding the defendant's criminal history and determined his offender score was 10, resulting in a standard range sentence of 63-84 months confinement.

On appeal to the Washington State Court of Appeals the defendant contended the juvenile convictions should not have counted toward his offender score. He argued that Due Process forbids the use of juvenile adjudications to raise an adult offender's

standard range where as a juvenile the defendant had no right to a jury trial.

In its response, the State appended the defendant's guilty plea forms and judgments from his juvenile adjudications. App B. The defendant objected on the basis that they were not before the trial court. App C. The State moved to supplement the record. App. D. The court declined to rule on the motion because the issue raised could be resolved without reference to those documents. App. E.

The Court of Appeals rejected the defendant's argument and affirmed his sentence. The defendant petitioned to the State Supreme Court. The Court had rejected an identical issue in State v. Weber, 149 P.3d 646 (2006), cert denied, 127 S.Ct. 2986 (2007) which denied review.

REASONS FOR DENYING THE PETITION

The court should deny review for three reasons. First, the defendant overstates the conflict between courts which have considered the issue presented here. The ruling in this case is consistent with the vast majority of those courts which have considered the issue. Second because the issue was not litigated at the trial court level, the record was not sufficiently developed to render a comprehensive decision on this issue. To the extent there is a record, it is not settled. Third, the Court does not have jurisdiction to consider a portion of the defendant's argument because it was not litigated in the State Courts.

A. The Court's Decision Is Consistent With An Overwhelming Majority Of Courts That Have Considered This Issue.

This Court has stated that "recidivism - is a traditional, if not the most traditional basis for a sentencing court's increasing an offender's sentence." Almendarez-Torres v. U.S., 523 U.S. 224, 243, (1998). As such, absent legislative intent to make them so, prior convictions are not elements of a crime which must be pled and proved to a jury. Almendarez-Torres, 523 U.S. at 247. This Court distinguished recidivism from all other facts which enhanced a defendant's sentence beyond the statutory maximum in Jones v. U.S., 526 U.S. 227 (1999). The Court suggested one possible basis for that distinction was the constitutional guarantees of fair notice, reasonable doubt, and the right to a jury trial. Jones, 526 U.S. at 249. The Court retained this distinction in Apprendi v. New Jersey, 530 U.S. 466 (2000). The Court held "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 489. (emphasis added)

In the wake of these decisions five federal courts of appeals and six state supreme courts have addressed whether prior juvenile adjudications in which the juvenile offender was not entitled to a jury trial, fell within the prior conviction exception outlined in Almendarez-Torres and preserved in Apprendi. The overwhelming majority of those courts have concluded that those juvenile adjudications are encompassed within that exception. Those courts reasoned that proceedings which afforded juveniles all of the process they are due result in a reliable determination of guilt. This determination may be constitutionally relied upon by trial courts in determining offender's maximum penalty.

Juvenile adjudications were first determined to be convictions for Apprendi purpose in U.S. v. Smalley, 294 F.3d 1030 (8th Cir. 2002) cert. denied, 537 U.S. 1114 (2003). The court acknowledged Apprendi exempted prior convictions from its general rule because of the certainty of procedural safeguards which supported them. While the court noted Apprendi "established what constitutes sufficient procedural safeguards (a right to jury trial and proof beyond a reasonable doubt), and what does not (judge-made findings under a lesser standard of proof), the Court did not take a position on possibilities that lie in between these two poles." Smalley, 294 F.3d at 1032. Smalley concluded the procedural safeguards afforded juvenile defendants, including notice, right to counsel, right to confront and examine witnesses, the privilege against self incrimination, and proof beyond a reasonable doubt "are more than sufficient to ensure the reliability that Apprendi requires". Smalley, 294 F.3d at 1033. Lack of a jury trial did not undermine the reliability of those adjudications because "the use of a jury in the juvenile context would 'not strengthen greatly, if at all, the fact finding function' and is not constitutionally required" Smalley, 294 F.3d at 1033 quoting McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

The question was next considered in Jones v. U.S., 332 F.3d 688 (3rd Cir. 2003) cert. denied, 540 U.S. 1150 (2004). The court observed that neither Apprendi nor Jones addressed whether juvenile adjudications could constitutionally qualify as convictions to be found by a judge before setting sentence. Like the Smalley court, Jones recognized that where juveniles have certain constitutional rights, they do not have a constitutional right to a jury trial. The court concluded that where a juvenile was afforded all of the constitutional protections he was due a prior non-jury juvenile adjudication may properly be characterized as a prior conviction for Apprendi purposes. Jones, 332 F.3d at 696.

The Eleventh Circuit followed the reasoning of the Eighth and Third Circuits in U.S. v Burge, 407 F.3d 1183, cert. denied, 126 S.Ct. 551 (2005). The court had earlier determined that prior adult convictions need not be proven to a jury for sentencing purposes because "the defendant has received the totality of constitutional protections due in the prior proceeding on the predicate offense." Burge, 407 F.3d at 1191 quoting, U.S. v. McGatha, 892 F.2d 1520, 1526 (11th Cir. 1990). Similarly, because juveniles are afforded all of the constitutional protections due in the prior juvenile proceeding, those adjudications may properly be characterized as a prior conviction. Burge, 407 U.S. at 1191.

Most recently the Sixth Circuit has joined the majority of courts that have considered this issue in U.S. v. Crowell ___ F.3d ___, (6th Cir. 2007) (WL 1814333). The court adopted the earlier courts' reasoning that Apprendi did not create a bright line rule setting out necessary procedural components to qualify a prior determination of guilt as a "conviction" which may be used to establish the defendant's sentence range. Rather, juvenile adjudications obtained through all of the procedural safeguards due juveniles did not violate due process or the holding in Apprendi.

The majority of State courts which have considered this issue followed the lead of the Federal courts. Washington State concluded that juvenile adjudications do constitute "convictions" which may be used in adult sentencing. State v. Weber, 149 P.3d 646 (2006) cert. denied, 127 S.Ct. 2986 (2007). The court relied on the State's historical use of juvenile adjudications at adult sentencing hearings and the legislative amendments to the Juvenile Justice Act which shifted its focus from rehabilitation to more traditional criminal punishment. It also considered the legislative requirement that, with the exception of the right to a jury trial, juveniles be afforded the same procedural protections as adults.

which was evidence of their reliability. The court concluded "in light of the aforementioned strong state indicators, we hold juvenile adjudications are convictions for the purposes of Apprendi's prior conviction exception." Weber, 149 P.3d at 653.

Earlier, other State courts agreed with this analysis. In Kansas the court determined juvenile adjudications were convictions to be used in adult sentencing proceedings in State v. Hitt, 42 P.3d 732 (2002), cert. denied, 537 U.S. 1104 (2003). The court reasoned Apprendi carved out the prior conviction exception based on the certainty afforded by procedural protections. It then held juvenile adjudications "are included within the historical cloak of recidivism and enjoy ample procedural safeguards" and therefore they were included within the Apprendi prior conviction exception. Hitt, 42 P.3d 15 740.

The Indiana Court followed the majority rule in Ryle v. State, 842 N.E.2d (2005), cert. denied, 127 S.Ct. 90 (2006). It reasoned that juvenile adjudications contained sufficient procedural safeguards to be reliable for the purpose of the prior conviction exception. In doing so the court noted juvenile adjudications were reliable enough to form the basis for confinement or to order wardship. Ryle, 842 N.E.2d at 323.

Minnesota has also joined the majority of court on this issue in State v. McFee, 721 N.W.2d 607 (2006). The court adopted the reasoning that juvenile adjudications are sufficiently reliable to fit within the prior conviction exception, stating "[i]t is illogical to say that a defendant is entitled to more process when the prior felonious behavior is used to increase a sentence than when the decision is made as to whether the felonious behavior occurred in the first instance." McFee, 721 N.W.2d at 617.

A single federal court, and two state courts, has found juvenile adjudications may not be used to determine an adult offender's sentence. Those opinions do not represent a significant split of authority on this question.

The first court to consider the question was U.S. v. Tighe, 266 F.3d 1187 (2001). The majority of that court relied on the language of this Court in Jones, suggesting that one reason to distinguish prior convictions from other facts which enhance an offender's sentence is that "'a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt and jury trial guarantees.'" Tighe, 266 F.3d at 1193 quoting Jones, 526 U.S. at 249. The Court then mechanically applied this language to the question regarding juvenile adjudications, without considering the rationale behind it. It determined a jury trial guarantee was absolutely required in order to qualify under Apprendi's prior conviction exception. Tighe, 266 F.3d at 1194.

Notably, Tighe did not explicitly overrule its prior decision in U.S. v. Williams, 891 F.2d 212 (1989) cert.denied, 494 U.S. 1037 (1990). The Williams court stated "if it does not violate due process for a juvenile to be deprived of his or her liberty without a jury trial, we fail to find a violation of due process when a later deprivation of liberty is enhanced due to this juvenile adjudication." Williams 891 F.2d at 215. This is, in essence, the same rationale adopted by the majority of courts who have considered this question.

Tighe chose to distinguish the ruling in Williams on the basis that the sentence in Williams did not result in a sentence which increased the statutorily mandated range for the sentence. Tighe, 266 F.3d at 1192. This left open the possibility that there were some cases in which the Ninth Circuit would have found the

use of prior juvenile adjudications permissible. Later the Ninth Circuit acknowledged that the majority rule on this issue was not contrary to, or involved an unreasonable application of Supreme Court precedent. Boyd v. Newland, 467 F.3d 1139 (9th Cir. 2006). These rulings significantly weaken the Tighe court's decision.

The two state opinions which have held that juvenile adjudications do not fall within Apprendi's prior conviction exception have done so on independent state grounds.

The Louisiana Supreme Court relied on Article 1, §17 of its state constitution to find juvenile adjudications, in which the offender was not afforded a right to a jury trial, to be non-criminal. State v. Brown, 879 S2.2d 1276 (2004) cert. denied, 543 U.S. 1177 (2005). The provision required the right to a jury trial as a prerequisite to a criminal conviction. The court stated "[i]t would be incongruous and illogical to allow the non-criminal adjudication of a juvenile delinquent to serve as a criminal sentencing enhancer." Brown, 879 So.2d at 1289. Nevertheless, the court recognized a contrary, but reasonable school of thought, on whether juvenile adjudications could qualify as prior convictions for felony sentence enhancement purposes. Brown, 879 So.2d at 1285.

The Oregon Supreme Court similarly rejected the majority rule on this issue at least in part on state grounds in State v. Harris, 118 P.3d 236 (2005). The court agreed that the procedural protections afforded a juvenile gave those adjudications "a high degree of reliability." Harris, 118 P.3d at 245. The court also opined that "if that adjudication qualifies as a prior conviction." it would be subject to judicial, rather than jury finding. Harris, 118 P.3d at 244 n. 8. However, the court went on to note that under Oregon law, juvenile adjudications are not considered criminal convictions. Harris, 118 P.3d at 245. That fact, and the Sixth

Amendment's division of authority between judge and jury, led the court to hold that while the use of prior juvenile adjudications at adult sentencing does not violate the Sixth Amendment, their existence "must be proved to a trier of fact" or admitted by the defendant. Harris, 118 P.3d at 246.

As the petitioner notes there has been a difference of opinion among various court regarding the use of prior juvenile adjudications at adult felony sentencing proceedings. Given the fact that even courts who disagree with the majority rule recognize that rule is reasonable and not in conflict with existing Supreme Court precedence, the degree of division between the courts does not warrant review in this case.

B. The Record In This Case Is Not Settled

Even if the degree to which courts have disagreed on the question were a reason to grant the petition, this case does not present a good factual basis on which to do so. The record in this case is not entirely clear.

At sentencing the defense acknowledged his prior juvenile adjudications. As a result, the State had no opportunity to produce a record at the trial court level establishing the defendant's prior juvenile adjudications and the manner in which they were obtained.

On appeal to the State Court of Appeals the defendant attacked the reliability of his prior juvenile adjudications on the basis that he had not been afforded a right to jury trial. State sought to establish those prior convictions were the result of the defendant's guilty plea and thus reliable regardless of any jury trial right. App. A-C. The defense moved to strike the plea and judgment forms appended to the State's brief. App. D. The State

moved to supplement the record. App. E. In light of the Court's ruling in Weber, the defendant's guilty pleas were unnecessary to the determination of the case. The Court chose not to rule on the motion. App. F. While the Court cannot ignore the fact the defendant pled guilty to his prior juvenile offenses, because it is now aware of that fact, it is not entirely clear what their status is in relation to this petition. If the Court were to leave out the fact of the defendant's guilty plea in its analysis, it could lead to a misleading, or at a minimum incomplete, result.

The fact the defendant had pled guilty to the prior juvenile offenses is significant in light of his argument. In Blakely v. Washington, 542 U.S. 296 (2004) this Court applied Apprendi's holding to Washington's sentencing scheme. The Court ruled that the statutory maximum for Apprendi purposes was the maximum that could be imposed without finding any additional facts. Blakely 542 U.S. at 303-304. Thus, juries, and not judges, must determine additional facts which could justify a sentence above the standard range ascribed for any offense. Even so, the Court recognized that a defendant may stipulate to those facts, thereby waiving his Apprendi rights. "When a defendant pleads guilty, the State is free to seek a judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding." Blakely, 542 U.S. at 310.

Here the defendant stipulated to the relevant facts. When he pled guilty in juvenile court he stipulated to the relevant facts. When he admitted those prior juvenile adjudications counted toward his offender score at his adult sentencing hearing in this case, he again stipulated to the relevant facts. Even if the defendant's argument were accepted, he would not be entitled to relief because he waived any jury trial right he argues that he should have had as a prerequisite to use of those adjudications in his adult sentencing hearing.

C. One Of The Defendant's Arguments Was Not Raised And Decided By The State Courts. The Court Does Not Have Jurisdiction To Consider That Argument.

The defendant claims the Court has jurisdiction to hear his case under 28 USC §1257(a). That provision allows the Supreme Court to review final judgments or decrees rendered by the highest court of a State in which a decision may be had where the validity of a statute of any state is drawn in question on the ground that it is repugnant to the Constitution. "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." Webb v. Webb 451 U.S. 493, 496-497 (1981)

Here the defendant raises in two questions in which he seeks review. The first was litigated to final judgment in the State courts, the other was not.

The defendant first argues that the Sixth Amendment prohibits the use of his prior juvenile adjudications to enhance his adult sentence when the facts which constituted his criminal conduct were not found by a jury. This is the issue that he raised in the State court. The State court rendered a final decision on that issue when it rejected his argument on the basis of its decision in Weber.

The second issue is raised when he argues "[a]lternatively, the Court could hold – along the lines of the Oregon Supreme Court – that the Sixth Amendment allows defendants to contest before the current jury at least whether they were involved in the prior juvenile adjudications that the State alleges." Petition for Certiorari at 23. This issue raises the question whether the Sixth

Amendment requires that a defendant has a right to a jury determination on the existence of his prior convictions. Related to that question is whether the defendant has a right to a jury verdict on the identity of the individual named in the prior conviction. This is not the same question presented in the State court because it goes beyond the question of whether juvenile adjudications constitute "convictions" for Apprendi purposes.

It is an issue which has the potential to reach farther than prior juvenile adjudications. If the defendant has a right to a jury determination on the existence of his prior juvenile court adjudications, he could similarly argue he has a right to the same jury determination on his prior adult felony convictions. This is directly contrary to the Court's ruling in Almendarez – Torres, Jones, and Apprendi, reserving the question of prior conviction to judicial determination.

This Court has identified at least three reasons relevant here that petitioners must exhaust their issue in State court before being considered by the Court for review. It allows the State Court to correct any errors that may have occurred, it gives the parties the opportunity to develop the record necessary for adjudicating the issue, and it promotes judicial economy in the Supreme Court. Webb, 451 U.S. at 500-01.

Because the defendant never raised any issue with respect to his right to a jury trial on the existence of his prior juvenile court cases, that issue is not final within the meaning of 28 USC §1257(a). The Court does not have jurisdiction to consider that specific issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

Seth A. Fine, DPA
Counsel of Record

Kathleen Webber, DPA
Snohomish County Prosecuting
Attorney - Criminal Division
Admin East, 7th Floor
Everett, Washington 98201
(425) 388-3618
Attorneys for Respondent

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APPENDIX A

FILED
JAN 29, 1993 – 3:35 P.M.
KAY D. ANDERSON, COUNTY CLERK
SNOHOMISH CO. WASH

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH COUNTY
JUVENILE DIVISION

THE STATE OF WASHINGTON,	)	No. 92-8-01459-9
	)	
Petitioner,	)	STATEMENT OF
	)	JUVENILE ON
BOUNPONE B. SASOUVONG,	)	PLEA OF GUILTY
DOB: 01/11/77	)	
Respondent.	)	

1. My name is Bounpone Sasouvong.
2. My age is 16, and I have completed the 9th grade in school.
3. I have been informed and fully understand that I have the right to a lawyer, and that if I cannot afford to pay for a lawyer, the court will provide me with one at no cost. A lawyer can look at the social and legal files in my case, talk to the police, probation counselor, and prosecuting attorney, tell me about the law, help me understand my rights, and help me at trial.
4. My lawyer's name is Mark Voss.

5. I have been informed and fully understand that I am charged with the offense(s) of Taking a Motor Vehicle Without Permission, RCW 9A.56.070(1), a felony, and that the elements of the offense(s) are that the respondent, on or about the 23rd day of May, 1992, did intentionally and without permission of Vasily Stsiborsky, the owner and person entitled to the possession thereof, take and drive away a motor vehicle, to-wit: a brown 1982 Honda Accord, Washington license HXZ801, and, with knowledge that such motor vehicle had been unlawfully taken, did voluntarily ride in and upon such motor vehicle. I have been given a copy of the information.
6. I have been informed and fully understand that:
   (a) I have the right to a speedy and public trial in the county where the offense is alleged to have been committed.
   (b) I have the right to remain silent before and during trial, and I need not testify against myself.
   (c) I have the right at trial to hear and question witnesses who testify against me.
   (d) I have the right to testify on my own behalf and to have other witnesses testify for me. These witnesses can be made to appear at no expense to me.
   (e) I am presumed innocent until the offense I am charged with is proven beyond a reasonable doubt or I enter a plea of guilty.
   (f) I have a right to appeal a determination of guilt after trial.
   (g) If I plead guilty I give up the rights in statements 6(a)-(f). If the court in making its disposition enters a disposition outside the standard range,

after making a finding of manifest injustice, I understand that either the State or I may appeal.

18. The court has asked me to state in my own words what I did that makes me guilty of this offense. This is my statement. On or about May 23, 1992, myself and some other boys took a motor vehicle without permission. This happened in Snohomish County.
20. I plead guilty to the charge(s) as alleged on #5 on page 1.
21. I make this plea freely and voluntarily. No one has threatened to harm me or anyone else in order to have me plead guilty.

01/28/93	Sasouvong Bounpone
Dated	Respondent

I have read and discussed this statement with the respondent and believe that the respondent is competent and fully understands the statement.

01/28/93	Mark Voss
Date	Attorney for Respondent

The above statement was read by or to the respondent and signed by the respondent [X] in the presence of his/her attorney, after having knowingly, voluntarily and intelligently waived his/her right to an attorney, and in the presence of the undersigned Judge/Court Commissioner in open court. The court finds the respondent's plea of guilty to be knowingly, intelligently and voluntarily made, that the court has informed the respondent of the nature of the charge and the consequences of the plea, that there is a factual basis for the plea, and that the respondent is guilty as charged.

01/28/93	Joan Sullivan
Date	Judge

Approved for Entry:

Helene Blume	Mark Voss
Deputy Prosecuting Attorney	Attorney for Respondent
WSBA #15462	WSBA #19101

APPENDIX B

FILED
MAR 18, 1993 – 10:17 A.M.
KAY D. ANDERSON, COUNTY CLERK
SNOHOMISH CO. WASH

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH COUNTY
JUVENILE DIVISION

THE STATE OF WASHINGTON,	)	No. 93-8-00039-1
	)	
Petitioner,	)	STATEMENT OF
	)	JUVENILE ON
BOUNPONE B. SASOUVONG,	)	PLEA OF GUILTY
DOB: 01/11/77	)	
Respondent.	)	

1. My name is Bounpone Sasouvong.
2. My age is 16, and I have completed the 9th grade in school.
3. I have been informed and fully understand that I have the right to a lawyer, and that if I cannot afford to pay for a lawyer, the court will provide me with one at no cost. A lawyer can look at the social and legal files in my case, talk to the police, probation counselor, and prosecuting attorney, tell me about the law, help me understand my rights, and help me at trial.

4. My lawyer's name is Mark Voss.
5. I have been informed and fully understand that I am charged with the offense(s) of Taking a Motor Vehicle Without Permission, and that the elements of the offense(s) are on July 27, 1992, did intentionally and without permission of Jason Schoales, the owner and person entitled to the possession thereof, take and drive away a motor vehicle, to-wit: a red 1983 Honda Prelude, Washington license 498AJP, and with knowledge that such motor vehicle had been unlawfully taken, did voluntarily ride in and upon such motor vehicle. I have been given a copy of the information.
6. I have been informed and fully understand that:
    a. I have the right to a speedy and public trial in the county where the offense is alleged to have been committed.
    b. I have the right to remain silent before and during trial, and I need not testify against myself.
    c. I have the right at trial to hear and question witnesses who testify against me.
    d. I have the right to testify on my own behalf and to have other witnesses testify for me. These witnesses can be made to appear at no expense to me.
    e. I am presumed innocent until the offense I am charged with is proven beyond a reasonable doubt or I enter a plea of guilty.
    f. I have a right to appeal a determination of guilt after trial.
    g. If I plead guilty I give up the rights in statements 6(a)-(f). If the court in making its disposition enters a disposition outside the standard range.

after making a finding of manifest injustice, I understand that either the State or I may appeal....

18. The court has asked me to state in my own words what I did that makes me guilty of this offense. This is my statement. On July 27th 1992 I acted as a lookout for my friends when they took a 1983 Honda Prelude. I rode in the car knowing it had been stolen. This happened in Snohomish County.
20. I plead guilty to the charge(s) as alleged on #5 on page 1.
21. I make this plea freely and voluntarily. No one has threatened to harm me or anyone else in order to have me plead guilty.

03/15/93 — Dated

Sasouvong Bounpone — Respondent

I have read and discussed this statement with the respondent and believe that the respondent is competent and fully understands the statement.

03/15/93 — Date

Mark Voss — Attorney for Respondent

The court finds the respondent's plea of guilty to be knowingly, intelligently and voluntarily made, that the court has informed the respondent of the nature of the charge and the consequences of the plea, that there is a factual basis for the plea, and that the respondent is guilty as charged.

03/15/93 — Date

Paul D. Hansen — Judge

Approved for Entry:

Randall Yates	Mark Voss
Deputy Prosecuting Attorney	Attorney for Respondent
WSBA #8305	WSBA #19101

APPENDIX C

FILED
MAR 15, 1994
KING COUNTY SUPERIOR COURT CLERK
KING CO. WASH

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING COUNTY
JUVENILE DIVISION

THE STATE OF WASHINGTON,	)	No. 93-8-07605-5
	)	
Petitioner,	)	STATEMENT OF
	)	JUVENILE ON
BOUNPONE B. SASOUVONG,	)	PLEA OF GUILTY
DOB: 01/11/77	)	
Respondent.	)	

1. My name is Bounpone Sasouvong.
2. My age is 17.
3. I have been informed and fully understand that I have the right to a lawyer, and that if I cannot afford to pay for a lawyer, the court will provide me with one at no cost. A lawyer can look at the social and legal files in my case, talk to the police, probation counselor, and prosecuting attorney, tell me about the law, help me understand my rights, and help me at trial.

4. My lawyer is Jean Rietschel.
5. I have been informed and fully understand that I am charged with the offense of Taking a Motor Vehicle Without Permission, Residential Burglary – 2 counts, and that the elements of the offense are TMVOP – with knowledge that a motor vehicle has been taken unlawfully, voluntarily ride in the vehicle. Res Burg: Enter and remain unlawfully in a dwelling with intent to commit a crime and that I have been given a copy of the charge.
6. I have been informed and fully understand that:
    a. I have the right to a speedy and public trial in the county where I reside or where the offense is alleged to have been committed.
    b. I have the right to remain silent before and during trial, and I need not testify against myself.
    c. I have the right to hear and question witnesses who might testify against me.
    d. I have the right to have witnesses testify for me. These witnesses may be required to appear at not cost to me.
    e. I have the right to testify on my own behalf.
    f. I am presumed innocent until each element of the offense I am charged with is proven beyond a reasonable doubt or I enter a plea of guilty.
    g. I have a right to appeal a determination of guilt after a trial.
    h. If I plead guilty I give up the rights enumerated in 6(a)-(g).

14. The court has asked me to state in my own words what I did that resulted in my being charged with the offense. This is my statement. On 12/12/93 in King Co I was a passenger in a Dodge Van knowing it had

been unlawfully taken from Robert & Mariam Hunt. On 12/13/93 in King Co I unlawfully entered the dwellings of Dennis Roosendaal, Robin Pratt and Diat Kuamme with the intent to commit a crime.

15. I plead guilty to the charge.

03/15/94 — Dated

Sasouvong Bounpone — Respondent

The court finds the offender's plea of guilty is knowingly, intelligently and voluntarily made, that the juvenile has been advised by the court concerning the nature of the offense, that there is a factual basis for the plea and that the offender is guilty as charged.

03/15/94 — Date

Jean Rietschel, WSBA #7739
Defense Attorney

John C. Dorgan, WSBA #21930
Prosecuting Attorney

03/15/94 — Date

Mary W. Brucker — Judge

APPENDIX D

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

THE STATE OF WASHINGTON,	)	
	)	No. 54422-5-I
Respondent,	)	
	)	MOTION TO STRIKE
BOUNPONE SASOUVONG,	)	STATE'S RESPONSE
	)	BRIEF
Appellant.	)	

A. IDENTITY OF MOVING PARTY

The appellant, Bounpone B. Sasouvong, through his attorney, Elaine L. Winters, moves this Court to strike the State's Response brief as explained in Part B.

B. STATEMENT OF RELIEF SOUGHT

Specifically, Mr. Sasouvong argues the following portions of the Brief of Respondent are improper: (1) Appendix A, (2) Appendix B, (3) Appendix C, and (4) references to the material contained in the appendixes and argument based upon that material at pages 13-14.

C. FACTS RELEVANT TO MOTION

...

The Snohomish County Prosecuting Attorney's Response Brief includes three appendixes:

Appendix A – Information, Statement of Juvenile on Plea of Guilty, and Disposition Order in Snohomish County Juvenile Court Cause Number 92-8-01459-9.

Appendix B – Information, Disposition Order, and Statement of Juvenile on Plea of Guilty in Snohomish County Juvenile Court Cause Number 93-8-00039-1.

Appendix C – Information, First Amended Information, one page of a Certification in Support of Motion and Order Permitting Amendment of Information, Statement of Juvenile Offender on Plea of Guilty and Order Transferring Jurisdiction in King County Juvenile Court Cause Number 93-8-07605-5 and Disposition Order in Snohomish County Juvenile Court Cause Number 94-8-00490-5.

None of the documents included in the three appendixes were before the Superior Court when Mr. Sasouvong was sentenced, and they are not part of the record on appeal.

...

E. CONCLUSION

For the reasons stated above, Mr. Sasouvong requests this Court strike the State's Response Brief and order the State to file a brief deleting the improper portions of the brief within 7 days.

DATED this 15th day of February, 2005.

Respectfully submitted,
Elaine L. Winters, WSBA #7780
Attorney for Appellant

APPENDIX E

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

THE STATE OF WASHINGTON,	) No. 54422-5-I
	)
Respondent,	) STATE'S RESPONSE TO
	) DEFENDANT'S MOTION
BOUNPONE SASOUVONG,	) TO STRIKE STATE'S
	) BRIEF AND STATE'S
Appellant.	) COUNTER MOTION TO
	) STRIKE A PORTION OF
	) THE DEFENDANT'S
	) BRIEF OR IN THE
	) ALTERNATIVE TO
	) ALLOW THE RECORD
	) TO BE SUPPLEMENTED

I. IDENTITY OF MOVING PARTY

The State of Washington, respondent, asks for the relief designated in part II.

II. STATEMENT OF RELIEF SOUGHT

The State requests the court deny the defendant's motion to strike the State's response brief and take judicial notice of the court documents setting out the defendant's prior juvenile convictions by guilty plea, or allow the State to supplement the

record with those documents contained in Appendix A, B, and C to the State's response brief.

III. FACTS RELEVANT TO MOTION

...

The defendant was convicted by jury verdict of Residential Burglary in Snohomish County Superior Court. At sentencing the State presented the court with sentencing materials that included the defendant's "Appendix A". Appendix A contained all of the defendant's prior criminal history, including the nature of the charge, date, location and court in which those convictions were adjudicated. The defendant raised no issue regarding the use of his juvenile court convictions to determine his offender score at the time of sentencing. He did not object when the court included them in his offender score.

...

IV. GROUNDS FOR RELIEF AND ARGUMENT

The defendant's motion to strike the State's brief should be denied. While the actual documents that are contained in the appendices were not before the trial court, the court was aware of those convict ions by virtue of the Appendix A that had been supplied to the trial court at sentencing. Further, they are records form the same Superior Court in which the defendant was sentenced. The trial court as well as the Court of Appeals can take judicial notice of those records and their contents.

Additional evidence may supplement the record if (1) it is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through post judgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is

inadequate or unnecessarily expensive, and it would be inequitable to decide the case solely on the evidence already taken in the trial court. RAP 9.11(a). If the Court does not take judicial notice of the records of the defendant's juvenile convictions the Court should grant the State's motion to supplement the record.

Respectfully submitted on February 22, 2005.

Kathleen Webber, WSBA #16040
Deputy Prosecuting Attorney
Attorney for Respondent

APPENDIX F

The Court of Appeals
of the
State of Washington

Richard D. Johnson,
Court Administrator/Clerk

Division I
One Union Square
600 University Street
Seattle, WA 98101

June 29, 2005

Bounpone B. Sasouvong
DOC# 741360
AHCC
P.O. Box 2109
Airway Heights, WA 99001

Mary Kathleen Webber
Snohomish County PA's Office
MSC 504
3000 Rockefeller Avenue
Everett, WA 98201-4061

Washington Appellate Project
Attorney at Law
1511 Third Avenue, Suite 701
Seattle, WA 98101

Elaine L. Winters
Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101

CASE #54422-5-I
State of Washington, Resp/Cross App v. Bounpone B. Sasouvong, App/Cross Resp

Counsel:
The following notation ruling by Commissioner Susan Craighead of the Court was entered on June 28, 2005:

"As State v. Weber, No. 52911-1 has been decided, the stay is lifted. The file contains a motion to strike the respondent's brief on the basis that the State attached and relied on information that was not before the sentencing court regarding appellant's juvenile convictions. In light of Weber, it seems most practical for the court to simply disregard information that was not before the trial court rather than require the State to file a new brief. However, if appellant at this point wants the court to rule on his motion, he should inform the court by letter by July 8, 2005 and I will do so.

Sincerely,
Richard D. Johnson
Court Administrator Clerk